SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1968

No. 788

In the Matter of the Application of

KNICKERBOCKER INSURANCE COMPANY,

Petitioner,

for an order Staying the Arbitration Commenced by PATRICIA FAISON and CAROLYN E. RAINEY,

Respondents.

MOTION OF MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND *AMICUS CURIAE* BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION, a public corporation, created, organized and existing, pursuant to the Insurance Law of the State of New York, respectfully moves this Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the respondents herein, has been obtained, but the attorney for the petitioner has refused to consent to the filing of a brief by Motor Vehicle Accident Indemnification Corporation (hereinafter referred to as "MVAIC") as *Amicus Curiae*.

MVAIC has an interest in this case, in that, pursuant to Article 17-A of the Insurance Law of the State of New York, if, in this and all similar cases, the petitioner insurance company is relieved of its contractual liability to the respondents, MVAIC will be cast in liability to them.

Motion of Motor Vehicle Accident Indemnification Corporation for Leave to File Brief as Amicus Curiae in Opposition to Petition for Writ of Certiorari

None of the alleged constitutional points raised by the petitioner herein were mentioned in any of the three Courts of the State of New York which have heard and decided this proceeding. The petition herein says nothing concerning the jurisdictional necessity for preserving a constitutional point in the lower courts. The opinion of the Court of Appeals of New York (Page 17 et seq. of the petition) makes no mention of any constitution, United States, New York or otherwise, nor does the order of that Court (Pages 23 et seq. of the petition).

Additionally, the petition does not deal with the alleged substantive issue involved, i.e., the impairment of a contract right, except in the most general terms.

We have no way of knowing whether any of these points will be discussed by the respondents. Obviously, through no fault of the respondents, these points were not previously made by them.

We should note that MVAIC was previously granted leave to appear, *Amicus Curiae,* both in the Appellate Division of the Supreme Court of the State of New York for the First Department and in the Court of Appeals in New York.

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BRIEF, *AMICUS CURIAE,* OF MVAIC IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

This brief is submitted by Motor Vehicle Accident Indemnification Corporation, (hereinafter referred to as "MVAIC"), concurrently with a motion to this Court for leave to file such a brief. It is submitted in opposition to the Petition for a Writ of Certiorari.

Jurisdiction

This Court is without jurisdiction. The alleged constitutional issue is raised for the first time in this Court. There is not one word, either in the opinion of the New York Court of Appeals, or in its order, or in the order on reargument, relating to anything in the Constitution of

the United States, much less the part thereof relied on by the petitioner.

In *Ungar* v. *Sarafite,* 376 US 575, 84 Sup. Ct. 841 (1964), a case originating in the New York Courts, this Court held (376 US at 582, 583, 84 Sup. Ct. at 846) that the remittitur of the New York Court of Appeals is determinative in this Court as to the Constitutional issues raised and necessarily passed upon in the State Courts, citing *Bailey* v. *Anderson,* 326 US 203, 66 Sup. Ct. 66. As stated above, the remittitur is completely barren of any such statements.

Asbury Hospital v. *Cass County, North Dakota,* 326 US 207, 213, 66 Sup. Ct. 64 (1945) is to the same effect, as are a host of other cases, far too numerous to cite. In any event, the rule mentioned herein is one of the most familiar known to the law.

Petitioner moved for re-argument in the Court of Appeals, but quite obviously did not move to amend the remittitur so as to present, in some fashion or other, a Constitutional question (petition, p. 26). In its order denying re-argument, the Court of Appeals of New York said nothing whatever concerning any application by petitioner along such lines (petition, p. 26).

Petitioner's attempt to explain away its total failure to raise any constitutional question in the State Courts may charitably be described as a sham. On pages 6 and 7 of the petition, petitioner blandly states that the ground of decision of the Court of Appeals "was an unexpected surprise". The opinion of the Court of Appeals is not substantially different from that of Special Term (petition, p. 17). Even if it were, there was no particular reason why petitioner should have been surprised. On the face of it, the opinion of the Court of Appeals merely construes, in a manner adverse to petitioner's position, a standard New York liability insurance endorsement.

Petitioner states (p. 7):

> "Prior to the decision of the Court of Appeals, it was impossible to anticipate a federal question, especially when the most recent precedents in New York (by lower courts) followed the language of the endorsement to include coverage thereunder."

The opinion of the Court of Appeals states (petition, p. 21):

> "The decisions below have often been conflicting and irreconcilable."

Four conflicting New York lower court decisions follow. It is quite obvious that petitioner has misstated the law in New York, prior to the instant decision, and that it had no reason whatever to be surprised by the decision of the Court of Appeals, in view of the existing conflict of decision. Moreover, if, as petitioner seems to state, any adverse interpretation of the contract in question is unconstitutional, petitioner could easily have made that point in the New York Courts.

For the reasons stated, it is respectfully submitted that this Court has no jurisdiction, and the petition should be denied on those grounds alone.

No Constitutional Question is Involved

Petitioner invokes Article I, Section 10, Clause 1 of the Constitution of the United States, which states:

> "No State shall *** pass any *** Law impairing the Obligation of Contract ***."

There is no claim that the Legislature of the State of New York enacted any such proscribed legislation. Rather, the claim is that the Courts of New York have interpreted a contract in a manner which impairs petitioner's rights thereunder. That is not sufficient to bring the case within any alleged Constitutional proscription.

In *Barrows* v. *Jackson,* 346 U.S. 249, 260, 73 Sup. Ct. 1031, 1037 (1953), this Court, citing *Tidal Oil Co.* v. *Flanagan,* 263 US 444, 451, 44 Sup. Ct. 197, 198, stated:

> "It has been settled by a long line of decisions, that the provision of Section 10, of Article I, of the Federal Constitution, protecting the obligation of Contracts against State action, is directed only against impairment by legislation and not by judgment of Courts."

Thus, there simply is no Constitutional question to review.

In any Event, There was no Impairment of Contractual Obligations

If the instant opinion of the Court of Appeals constitutes the impairment of contractual obligation, in the Constitutional sense, then every unsuccessful litigant in an action, the point of which is to construe a contract, will be able to have his case heard before this Court. This is a manifest absurdity.

The instant decision is no more nor no less than the construction by the highest court of New York of an insurance policy endorsement, the terms of which are mandated by a New York statute, subdivision 2-a of Section 167 of the Insurance Law of the State of New York, the text of which is set forth at pages 13 and 14 of the petition. It is peculiarly the function of the New York Court of Appeals to interpret, definitively, such an endorsement.

CONCLUSION

The Petition Should Be Dismissed.

Respectfully submitted,

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